UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17

EYM KING OF MISSOURI, L.L.C.
D/B/A BURGER KING

Cases 14-CA-148915
and 14-CA-150321
14-CA-150794

WORKERS ORGANIZING COMMITTEE – KANSAS CITY

COUNSEL FOR GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Lyn R. Buckley
Counsel for General Counsel
National Labor Relations Board
Subregion 17
8600 Farley, Suite 100
Overland Park, KS 66212

Table of Contents

1. Introduction

The Respondent, EYM King of Missouri, LLC, doing business as Burger King, discriminated against employees because they engaged in protected strike activity, because they got together to try to improve wages and working conditions, and because they brought issues to the National Labor Relations Board (the Board). 1) Respondent coerced employees in the exercise of their rights to get together to try to improve wages and working conditions when Store Manager Kelly Sharts informed an employee that there were instructions to give written warnings to employees who engaged in strike activity. 2) Respondent unlawfully imposed written discipline against six employees because they engaged in protected strike activity. 3) Respondent refused to hire Terrance Wise, a long time employee of its processor, because he was a leader in employees' concerted efforts to try to improve wages and working conditions, and because he brought issues to the Board.

It should be noted initially that the Charging Party, the Workers' Organizing Committee—Kansas City, (the Union) is a labor organization. Employees participate (T 269) , and it exists in part to deal with employers to improve wages, hours, and working conditions. (T. 269)

Respondent is engaged in interstate commerce within the meaning of Section 2(2)(6) and (7) of the Act. Respondent stipulated that about March 26, 2015, it purchased the Burger King operations at 1102 E. 47th Street (the 47th and Troost location) and at 3441 Main Street (the Main street location) in Kansas City, Missouri. (G.C. ex 33; T 22). Since that time, in the operations of these locations, it has derived gross revenue in excess of $50,000, has purchased and received good valued in excess of $5,000 directly from points outside the State of Missouri, and has remitted royalty and advertising fees to Burger King on behalf of Respondent's Missouri facilities in excess of $5,000. (G. C. ex 33; T 22).

Counsel for General Counsel moves to amend the Amended Consolidated Complaint by deleting paragraph 5(a), eliminating the allegation that Hayes made statements on April 16 and 23, 2015 which violate the Act. Evidence was not produced in support of these allegations.

2. Independent 8(a)(1): Store Manager Kelly Sharts statement that she was instructed to issue written warnings to employees who went on strike on April 15, 2015

Sharron Jones is an employee at Respondent's Burger King located at 3441 Main Street in Kansas City who was still employed there at the time of her testimony. (T. 217). Jones has been employed at this location for seven years. (T. 217). In April, 2015, and until June, 2015, Jones' supervisor was Store Manager Kelly Sharts. (T 217-218). Sharron Jones went on strike on April 15, 2015 and returned to work on April 16, 2015. (T 216). On April 16, Store Manager Sharts walked up to Jones and said, guess what they want me to do? Write you guys up for the strike. Sharts left for a minute and then returned and said, don't worry about it: I took you guys off the schedule. That's not right to write you up, so don't worry about it. You're fine. Sharts told Jones that all general managers of the stores got an email to write all employees that went on strike up for no call/no shows. (T. 221-222).

The Board's well-established test for interference, restraint, and coercion under Section 8(a)(1) is an objective one and depends on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959).

Sharts' statements are clearly coercive: stating that higher management wants store managers to discipline striking employees sends a clear message to employees that strike activity is risky and can bring adverse consequences. This statement violates employees' Section 7 right to engage in union and protected concerted activity in violation of Section 8(a)(1) of the Act.

This testimony was not denied. Sharts, alleged and admitted to be an agent of Respondent, was not called as a witness by Respondent. There was no showing that Respondent made any attempt to subpoena her as a witness or obtain her testimony. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have had knowledge. , 285 NLRB 1122, 1123 (1987). This is particularly true where, as here, the witness is the Respondent's agent. See *Roosevelt Medical Center*, 348 NLRB 1016, 1022 (2006).

Jones was employed by Respondent at the time of her testimony: she had an economic disincentive to testify. She appeared and testified anyway to the truth of what happened that day. *See Flexsteel Industries*, 316 NLRB 745 (1985), enfd. mem. 83 F.3d 419 (5th Cir. 1996). Jones' testimony was clear and convincing.

Respondent presented testimony that other store managers did not get a "global" email instructing that striking employees be written up. This testimony was primarily from store managers at stores where employees did not strike and managers from other cities. Aaron Knox was a store manager in Springfield, Missouri where employees did not strike. (T. 250). Tammy Young was a store manager at a North Oak Trafficway, a store not involved here. (T. 287-288). Kelly Ragar worked as a Regional Manager over stores in the Springfield, Missouri area. (T. 311-312.) Most of these witnesses were newly promoted by Respondent to positions as area managers who have an interest in pleasing their new employer and maintaining their new positions. (T. 248; 304; 306). Reda Hayes denied receiving a "global" email or any email on discipline for strikers. (T. 366). Hayes too had a strong interest in testifying in favor of Respondent, her employer, and should not be credited here, as discussed below. Respondent failed to rebut Jones' testimony that Sharts told Jones that she received an email with instructions to write up striking employees. Further, even if Sharts did not get a global email, this does not show that Sharts did not get an email or other instructions telling her to write up striking employees.

Jones' testimony should be credited. Sharts' statement to her on about April 16, 2015 shows animus, and suggests that higher management of Respondent issued explicit instructions that strikers be given no call no show disciplinary write ups for participating in the April 15, 2015 strike. Although Store Manager Sharts did not write up her employees, nearby Store Manager LaReda Hayes did (called Reda Hayes by all witnesses).

Respondent argues Sharts 'statement is lawful because the April 15, 2015 strike was unprotected. This argument must be rejected as discussed below.

3. 8(a)(1) and (3): Respondent unlawfully gave written no call no show warnings to six employees who went on strike on April 15, 2015

a. The no call no show warnings to six strikers violate Section 8(a)(1) and (3)

Employees Susana De La Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myesha Vaughn went on strike on April 15, 2015. (T 162; 170; 193-94). All six were employed at Respondent's Burger King located at 2201 E. 47th street, also called 47th and Troost. All six were given written warnings the day they returned from striking or soon thereafter by Store Manager Reda Hayes. (G. C. Ex. 41; 174; 198-199;). Reda Hayes knew, when she gave these employees write ups, that they had been on strike the day before. (T. 163; 164-165; G.C. ex 21; 196-198; G.C. ex 22; 354; R. ex. 25; 389; 389) Respondent received notice on April 15 that the six were on strike to try to improve wages and working conditions. (T. 22; 157-258; 266-268; G.C. ex 23; R. ex. 25) Respondent received notice on April 16 that all six were returning to work for their next regular shift. (T. 162-169; G.C. ex 22; 196-199) Store Manager LaReda (Reda) Hayes testified that when she gave these warnings to the six employees, she told them "due to your not showing up on your scheduled shift, I have documentation for you." (T. 389). Respondent did no further investigation before it disciplined these employees. (T. 178; 203; 389) Respondent gave written warnings to these six employees for their actions when they went on strike on April 15, 2015.

Withholding their services on April 15 was protected, and employees need give no prior notice when they are going to strike. It is well established that employees may not be discharged or otherwise discriminated against for engaging in protected concerted work stoppages to protest wages, hours, or working conditions. *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962). A discharge of striking employees—purportedly for not calling in or showing up for work – amounts to a discharge for the act of going on strike and accordingly is unlawful. *CGLM, Inc.,* 350 NLRB 974, 979-980 (2007), enfd 280 F. App'x 366 (5th Cir. 2008). In *CGLM*, the employer argued that it discharged employees because of their failure to report to work and because they did not call in. As explained in *Burnup & Sims, Inc*., 256 NLRB 965 (1981), "the existence of or lack of unlawful animus" is not material when "the very conduct for which employees are disciplined is itself protected concerted activity." *Id* at 975. Calling a strike … an absence from work justifying discharge is to write Section 13 out of the Act." *Anderson Cabinets*, 241 NLRB 513, 518-519 (1979), enfd 611 F.2d 1225 (8th Cir. 1979); *CGLM, Inc*., *supra* 350 NLRB at 979. Section 13, which preserves and protects the right to strike, provides that "Nothing in this Act [subchapter] shall be construed so as either to interfere with or impede or

diminish in any way the right to strike or to affect the limitations or qualifications on that right." See also *Atlantic Scaffolding Company*, 356 NLRB No. 113 (2011) (Advance sheet at pp 4-5). Any attempt to argue that handbook provisions regarding attendance or attendance policy can restrict or put conditions on the right to strike as clearly set out in Section 13 has been clearly rejected by the Board. *Wright Line* analysis does not apply. *CGLM, Inc*., *supra* 350 NLRB at 974 fn 2; *Atlantic Scaffolding Company*, *supra* 356 NLRB Advance sheet at pp 4-5. Discipline or discharge for failing to adhere to attendance policies on the day of a strike cannot be separated from the strike activity itself. Most certainly, if an Employer cannot discharge employees for striking, it also cannot discipline them for striking—it cannot discriminate against them in any way. As stated in *CGLM*, *supra* 350 NLRB at 979, "The fact that the employees gave no advance notice of their intention is immaterial. The failure of the employees to report to work was "a concerted action for mutual aid and protection", citing *Lisanti Foods, Inc*., 227 NLRB 898, 902 (1977).

Where employees are disciplined or discharged for engaging in a protected concerted work stoppage, *Write Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer's motive. Rather, when the conduct for which employees are disciplined is itself protected concerted activity, the only issue is whether that conduct lost the protection of the Act because it crossed over the line separating protected and unprotected activity. See *Atlantic Scaffolding Company*, *supra*, 356 NLRB No 113 (2011) Advance sheet at pp 5-6; *CGLM, Inc*., *supra,* 350 NLRB 974 at fn 2. The burden is on the Respondent to show that the conduct lost protection of the Act.

The Respondent has failed to show that the strike activity of the six employees lost the protection of the Act. This activity was peaceful, and did not obstruct the premises of the Respondent. The only argument that it was unprotected is the Respondent's argument that it was an intermittent strike. Respondent took over ownership and operation of the two locations in question on about March 26, 2015: April 15, 2015 was the first strike against the Respondent by any of these six employees. Furthermore, April 15, 2015 was the first strike for some of these employees such as Osmara Ortiz who began at that location in November, 2014. (T. 190). It was the second strike for West Humbert. (T. 185). On April 15, 2015, these six employees went on strike against Respondent for the first time. The action of the six

employees against their new employer was not an intermittent strike. The six employees here were engaged in protected concerted activity on April 15, 2015: given these facts alone, it clearly was not an unprotected intermittent strike.

As noted above, the test set out in *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1st Cir. 1981), cert den 455 U.S. 989 (1982) is not applicable here, but, if it were, the facts here show a violation of the Act. The six employees were engaged in protected concerted activity (as discussed above), Respondent knew of this activity (as discussed above), and Respondent had animus against that activity. Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. Robert Orr/Sysco Food Services, 343 NLRB 1183, 1184 (2004); Ronin Shipbuilding, 330 NLRB 464, 464 (2000). Both circumstances argued in this brief, including the warnings to six strikers and the refusal to hire Wise, and the direct evidence of Sharts' statement to Jones that Sharts was instructed to give written discipline to employees who participated in the April 15, 2015 strike, show this animus. Once this initial showing is made, the burden shifts to Respondent to show that it would have taken the same action even in the absence of the employees' protected union activity. Respondent has failed to show that it would have disciplined these six employees in the absence of union activity. Discipline varied from store to store: Sharts decided not to give employees discipline that time at that store because they went on strike. Respondent offered warnings from stores other than the store at 47th and Troost which are irrelevant here. Respondent failed to show at the store in question; employees were written up every time they were late. Further, Sharts told Jones that she was given a directive to write up employees who went on strike on April 15, 2015, which suggests that Respondent's managers thought that a directive was necessary and that otherwise, those employees might not be written up.

b. The April 15, 2015 strike was protected activity and was not an unprotected partial or intermittent strike

Respondent argues that this strike was one of a series of strikes which were unprotected intermittent strikes. This argument too must be rejected. The six employees here were engaged in protected concerted activity on April 15, 2015: it was not unprotected intermittent strikes. The right to strike is statutorily protected by Sections 7 and 13 of the Act. Section 7 grants employees the right to peacefully strike, picket and engage in other concerted

activities. *NLRB v. Preterm, Inc*., 784 F.2d 426, 429 (1st Cir. 1986) Section 13 provides that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right unless specifically provided for by the Act itself. *NLRB v. Teamsters, Local 639*, 362 U.S. 274, 281 (1960). Without question employees have a protected right to withhold services from an employer whether to protest unfair labor practices or to act together to better their wages and working conditions. *Embossing Printers*, 268 NLRB 710, 722 (1984), enf'd mem 742 F.2d 1546 (6th Cir. 1984); *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 14-15 (1960).

The Board has been particularly likely to find work stoppages protected when the employees were not represented by a union. *Id.* This is because unrepresented employees lack a lawfully implemented grievance procedure as well as lacking a recognized bargaining representative to assist them in negotiating improved working conditions and resolving grievances. *See Serendippity-Un-Ltd*, 263 NLRB 768, 775-76 (1982).

Concerted work stoppages in the past have lost the protection of the Act only in limited circumstances where the tactics have been found to be inconsistent with those of a genuine strike. The mere fact that employees have engaged in multiple work stoppages does not render their activities unprotected. In *United States Service Industries*, 315 NLRB 285, 285-286 (1994), three work stoppages in six months were found protected where employees were not "engaged in a campaign to harass the company into a state of confusion, enf'd mem 72 F.3d 920 (D.C.Cir. 1995). Two work stoppages in three months were found not a pattern of recurrent and intermittent work stoppages because otherwise employees could not engage in more than one instance of concerted protected activity during an indefinite time period regardless of the variety and number of conditions protested and the identity of the individuals involved. *Robertson Industries*, 216 NLRB 361, 361-362 (1975), enf'd 560 F.2d 396 (9th Cir. 1976). In West-Pac Electric, 321 NLRB 1322, the Board found that three strikes within a two week period were protected where they were not part of a hit-and-run scheme nor intentionally planned to reap the benefit of a continuous strike, and were for separate employer acts.

Employees are not required to institute the strike at any particular time of the day or to maintain it for any particular period of time to be entitled to the protection of the Act. *First*

National Bank of Omaha v. NLRB, 413 F.2d 921, 925 (8th Cir. 1969), enforcing 171 NLRB 1145 (1968). A requirement that a strike not be disruptive of an employer's operations, or harassing to it, is a requirement that the strike not be conducted. *Allied Mechanical Services, Inc*., 341 NLRB 1084, 1102 (2004), enf'd 668 F.3d 758 (D.C. Cir. 2012).

Although the Board has not enunciated a bright-line test for when employees' strike tactics result in the loss of the Act's protection, unprotected work stoppages share a common feature of violating economic "fair play" through actions that are calculated not simply to disrupt the employer's operation, but to prevent the employer from exercising its managerial authority to maintain its operation through the disruption. Such schemes include schemes that seek to bring about conditions that involve neither strike nor work, such as the use of intermittent work stoppages or work stoppages only in a key part of the operation that cripple other parts of the operation. *See National Steel & Shipbuilding Co*., 324 NLRB 499, 509 (1979); *First Nat'l Bank of Omaha, supra* 171 NLRB at 1151.

There are two types of scenarios, which partially overlap, in which the Board finds that strike actions lose protection. The Board has found that work stoppages lose protection when they are intentionally planned and coordinated so as to effectively reap the benefits of a continuous strike action without assuming the loss of wages and possible replacement associated with a continuous forthright strike. *WestPac Electric*, 321 NLRB at 1360. Refusal of employees to work in one section while accepting pay for work in other sections was found unprotected. *Audubon Health Care Center*, 268 NLRB 135 (1983).

The April 15 work stoppage of these six employees did not lose protection under the rationale of either of the above scenarios This work stoppage was not designed to reap the benefits without the risks. There is no evidence that the strike here, or any that preceded it with other employers at other times, brought about a condition that was neither strike nor work such that the strikers were trying to dictate the terms and conditions of employment: employees may not simultaneously walk off the jobs and retain the benefits of working—loss of pay and risk of being replaced. Where employees work regular hours but refuse to work overtime, such activity has been found unprotected. *Honolulu Rapid Transit Co*., 110 NLRB 1806, 1811 (1954); *C.G. Conn, Ltd. v. NLRB* 108 F.2d 390, 397 (8th Cir. 1939); Polytech, Inc., 195 NLRB at 696. Here, when employees went on strike on April 15, they ceased all work—they did

not remain on the job and cease only some of their duties, and they lost pay for their entire shifts that day. Loss of pay for an entire shift is a severe loss for low wage employees such as these who are barely scraping by on their full wages. (T. 229). Also, in their status as strikers, even for one day, they risked being replaced by the Respondent.

The Board has also found multiple work stoppages to be unprotected where they involve calculated unpredictability such as hit and run tactics intended to harass the company into a state of confusion. In *Pacific Tel. & Tel. Co*., 107 NLRB at 1548-1549, strikes were called but picketing ended when emergency crews reached the picketed location, and these repeated strike actions repeatedly shut down the employer's nationwide operation. The Board noted that the employer was entitled to know whether the operation was going to continue for the day or not, and that the strikers were unwilling to give that assurance. Applying these principles here, the strikes were not unlawfully designed to harass the employer into a state of confusion or to cripple the operations. Only eight employees joined the strike and only six missed their shift at the 1102 E. 47th street location where about 25 people work. (T. 387; R. ex 21) Not all of the strikers were scheduled to work at the same time. In addition, this employer maintains and enjoys the flexibility it has built by using mostly part time employees working what is often short shifts. (T. 387; R.ex 21) This employer did not need to hire replacements: it could increase the hours of other employees. Store Manager Reda Hayes admitted that one worker came in early. (T. 400) Non-striking restaurant personnel were able to perform their work, and all positions were covered. (T. 387) Customers were served. The restaurant did not shut down. (T. 387) The main complaints were that customers had to wait longer than usual (T 354), and that the employees remaining worked harder than usual. This was not a high impact strike that utilized only a small number of employees in one department to cripple the work of other departments also. Here, a small percentage of employees participated in the strike and there were lengthy periods – four to six months --between past strikes. This is not a situation where a union leaves an employer in disarray by striking multiple times in a very short amount of time. This is not a situation where recurring and unscheduled strikes of skilled employees taxed the Respondent's ability to hire replacement workers and keep the operation going.

This is not a situation in which these six employees have been involved in multiple prior strikes. Respondent did not show that these six employees have been involved in repetitive hit

and run type strikes. Respondent argues that each of the six employees disciplined had participated in previous strikes but cites testimony which does not support that argument. Respondent's Brief dated September 14 at page 13, argues previous repeated strike activity by the six disciplined employees. As shown in transcript pages 125 to 127, the question put to the witness was not whether they had engaged in previous strikes, rather the question was whether employees had engaged in "protected activity"(T. 124 line 19; T. 127 lines 9-11), and the witness answers referred specifically to a safety petition, and a photo on the side of a bus. (T. 127 line 17 and T. 127 lines 9-11). Further, the testimony at pages 333 to 338 was that names had appeared on a prior strike notice – not multiple strike notices. Further, it was not specified how long ago any prior strike participation was. (T. 333 – 338). Although initially, Ortiz misunderstood a question as to whether she was involved in strikes before April 15, 2015, her subsequent testimony showed that those instances were not strikes where employees withheld their services, but rallies with speakers which were not held at the premises of employers. (T. 212-214). Ortiz began employment with Respondent in November, 2014. Respondent misrepresents this evidence in the same way again in its September 14 brief at p. 20 under heading 7.

In its brief, Respondent argued that newspaper articles showed multiple prior strikes. In doing so, it is attempting to rely upon pure hearsay. Reporters do not always get their facts correct, even in the most reputable newspapers. The articles regarding Wise were offered to show his high profile in the union movement and Respondent's knowledge of his union activity, not to show the truth of everything in the articles. (T. 35, 36, 37, 39-40). Reliance upon such hearsay is unwarranted without much more support than is present in this record. This is particularly true because many past actions have been rallies, not strikes. (T. 212-214). Respondent, in its questioning at hearing, failed to differentiate between strikes and rallies. Board analysis of intermittent strikes has not included rallies without work stoppages and rallies which are not directed at particular employers. Limitations on rallies would raise constitutional first amendment issues. Here, any restriction on rallies would violate rally participants' right to free speech guaranteed by the first amendment of the U. S. Constitution.

This is not a situation in which employees are represented by a union so that they could effectively communicate with unit members in order to orchestrate a complex plan designed to

maximize employer disruption while minimizing employee risk, or to harass the Respondent into a state of confusion. *Cf. National Steel and Shipbuilding Company*, 324 NLRB at 509-510; *Pacific Tel. & Tel. Co*., 107 NLRB at 1548. Just as importantly, although the Workers Organizing Committee--Kansas City, the Union, coordinated some of the employees' concerted activities, there is no evidence that it intentionally orchestrated the strikes in such as way as to shield employees from the risks associated with the status of strikers. The importance of finding these activities to improve wages and working conditions protected is heightened by the fact that the employees are not unionized, and thus have no exclusive representative to speak on their behalf or any negotiated mechanism for resolving their grievances.

The Respondent argues that employees are not protected when they participate in a rally protesting something like immigration policy because it was not directed specifically at their employer in protest of their specific terms and conditions of employment. (citing *Calmex, Inc. d/b/a Chevy's* advice memo in Case 32-CA-22651 issued November 30, 2006). *Calmex* is distinguishable on its facts. That case involved an immigration rally directed at federal immigration policy. Here, on April 15, 2015, the six employees in question were seeking higher pay from <u>their</u> employer. They were also demonstrating in support of a raise the minimum wage, but this does not change the fact that they were seeking remedies from their employer. Where employees were clearly protesting against their own Employer and against their specific terms and conditions of employment, they are engaged in a protected concerted work stoppage. *Gates & Sons Barbeque of Missouri, Inc*., 361 NLRB No. 46 (Sept 16, 2014). In the absence of special circumstances, a strike to secure higher pay is protected concerted activity. *California Gas Transport*, 347 NLRB 1314, 1319 (2006), enfd 507 F.3d 847 (5th Cir. 2007).

Wages of at least $15 per hour and improved working conditions were sought from <u>this</u> Respondent in <u>this</u> strike. The strike notice that each of <u>these six</u> employees signed and which was delivered to Respondent on April 15, 2015 stated:

> " To: Burger King, 1102 E. 47th St., Kansas City, MO 64110.
> Attention management and ownership of this restaurant: This is to notify you that on April 15, 2015, we workers are going on strike for respect in the workplace. We are striking to protest unfair labor practices, unsafe working conditions, unpredictable scheduling and wage theft occurring here, in workplaces in our city, and in solidarity with fast food and convenience store workers across the country. We are particularly concerned about ensuring a safe

> workplace. Here in Kansas City, workers have been subject to burns, lack of protective equipment, lack of first aid kits, and more. We are also striking to demand a $15 an hour wage and the right to join a union without retaliation. We are not making a present demand for recognition at this time. …
>
> This company is profitable because of our hard work, but we are paid poverty wages that are not enough to pay for the basics like food, rent, and utilities. We want to properly care for our families, so we are taking a stand to improve our future."

(G.C. ex 21, 23). One copy of this notice was signed by West Humbert, Osmara Ortiz, and Susana de la Cruz Camilo (G.C. ex 21) and was submitted to the Employer on April 15, 2015. Another copy of this notice was signed by Audrika Brown, Kashanna Coney, Myesha Vaughn, Destiny Smith, and MyReisha Frazier (G.C. ex 23) and was submitted to Respondent at about 2:30 p.m. on April 15, 2015. (T. Reda Hayes). Hayes denies receiving the strike notice signed by Humbert, Ortiz and Camilo but admits that after 2:30 on April 15, she knew it was a strike. (T. 389), she knew all six had not come in, and that some of them were engaged in the strike. (T. 389). When asked which ones were on the signed strike notice that she received, she could not say. (T. 389). General Counsel submits that this is because she knew that all six were on strike.

The Return to work notices signed by Humbert, Ortiz and de la Cruz Camilo (G. C. Ex 22) and received by Respondent on April 16, 2015 when the first of the group returned to work for their regularly scheduled shift (T. 164-165), states as follows:

> We are unconditionally returning to work for our next regularly scheduled shift. We make this offer following our lawful, peaceful, strike that began April 15, 2015, to demand a $15 an hour wage, the right to form a union without intimidation, and to protest unfair labor practices, unsafe working conditions, abusive supervisors, and wage theft occurring here, in workplaces in our city, and in solidarity with fast food and convenience store workers across the country. You are prohibited by federal law from firing, discriminating or otherwise retaliating against us for fighting together to improve our jobs and to safeguard our rights."

(G. C. ex 22).

The fact that the Union sought to publicize the campaign and seek support from the public in attaining those goals did not deprive striking employees of the protection of the Act. Employees enjoy a Section 7 right to publicize a labor dispute. *See The Sheraton Anchorage*, 359 NLRB No. 95, slip op at 4 (April 24, 2013). Employees seeking to "improve terms and

conditions of employment or otherwise improve their lot" have the Section 7 right to seek support for their cause "outside the immediate employee-employer relationship." *See Eastex Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

Outside the health care setting, unions and employees are not obliged to provide the employer advance notice that they are going on strike. In the health care setting, unions are obliged to give advance notice of strikes. *Care Center of Kansas City*, 350 NLRB 64 (2007) is distinguishable from the instant case. In that case, because of the strong evidence that the union intended to engage in a series of recurring intermittent work stoppages, because the work stoppages were implemented with two or three week end strikes within about six weeks (the third was called off two days ahead), because of evidence that the union intended to continue engaging in repeated week end work stoppages as a part of its bargaining strategy until a contract was reached, the strike activity in this health care setting was found to be unprotected. *Id* at p. 68. In reaching this conclusion, the Board relied upon the line of cases in which unions engaged in partial work stoppages—where employees refused to work overtime, citing cases such as *Honolulu Rapid Transit Co*., 110 NLRB 1806 (1954). In the instant case, there was no partial stoppage. The six employees in question all missed a full day of work. In the instant case, there have been no prior strikes against this Employer. In the instant case, this was the first strike for some employees. In this case, the earlier strikes against other employers were at least 6 months before the April 15 strike. The instant case did not take place in a health care setting. It should be noted, though, that in *Care Center of Kansas City*, it was stated that the strike was not rendered unprotected because it may have been designed to disrupt the employer's operations and to provide an incentive for employees to participate in the strike. *Id* at p. 67. The Board rejected the argument that the employer was effectively deprived of its right to permanently replace employees who engaged in periodic 2-day economic strikes: there was no legal impediment to permanently replacing such economic strikers regardless of the length of each strike. *Id* at p 67.

4. 8(a)(1)(3) and (4): Respondent refused to Hire Terrance Wise because of his union and protected union activity, protected concerted activity and because he brought unfair labor practice issues to the NLRB

a. Respondent was hiring and refused to hire Wise while hiring the other employees at 1102 E. 47th Street

Respondent was hiring about March 25 or 26, 2015, when it refused to hire Terrence Wise. Wise applied about March 25, 2015. (T. 64) Respondent hired other employees who had been employed at the store, but not Wise. (T. 76: 162; 192-193; G. C. ex 34) Indeed, the employee witnesses thought that all employees at this store other than Wise were carried over from the previous employer to Respondent. (T. 162; 192-193).

b. Wise was qualified

Terrence Wise was qualified for hire. He had been employed at that location, under the direction of supervisors and managers who were carried over from the previous employer to Respondent. He was a long time employee at that location: he had worked at various Burger King locations for 11 years, at the 47th and Troost store for 6 years, and under the supervision of Store Manager Reda Hayes since about 2009. (T. 29-30; 42) . He was a versatile employee who worked in the kitchen, customer service, and performed maintenance duties in the store. (T. 30). He worked various shifts at various times in his employment. (T. 30). Fellow employees knew him as a capable, hard working and dependable employee. (T. 176; 201-202).

c. Wise's protected union, protected concerted, and NLRB activities were known to Respondent

Wise's union and protected concerted activity was well known to his supervisors and managers, who were also Respondent's supervisors and managers in March and April, 2015. First and foremost, these activities were known to Reda Hayes.

The Workers Organizing Committee—Kansas City (the Union) is a city wide organization of fast food workers and other low wage workers who have been working for $15 and the right to form a union without retaliation, among other employment related goals. (T. 30). The Kansas City organization is one of such organizations in cities around the U.S, and, banded together at the national level, is called "Fight for 15". (T. 30). Wise explained that they organize as workers to demand better as employees, better wages, respect, and dignity at the

work place. (T. 30-31). It is an organization of employees who organize and fight for better in the work place. (T. 31; 269). Employees participate in the group and its activities to attain better wages, hours, and working conditions. (T 31; 269). The group focuses on Employers, who control wages, hours, and working conditions. 9T 31,) Activities of WOC-KC include rallies, strikes, protests, petitions, and health and safety campaigns. (T 31) In about early March, 2015, employees at the 47th and Troost Burger King (under the previous owner), including Wise and fellow employee West Humbert and Osmara Ortiz, signed a petition seeking better health and safety conditions such as safety equipment and well stocked first aid kits, and took it to Store Manager Reda Hayes. (T. 199-201). Wise was an early leader, starting with the group in the spring of 2013. and continued to be such at the time of the hearing. (T 33; 272-273). Wise involved other employees at his work place (T. 272-273) Wise was a leader in Kansas City (T. 202; 270) and nationally in New York, Chicago, and Las Vegas. (T. 32; 201-202; 271) He has also traveled to Ireland to further the efforts of the group. (T.32; 271) Although other employee witnesses have been active in the group, none have had such extensive efforts or such well-known and well-publicized efforts as Wise. (T 34; 202; 272-273). He has been quoted and featured in local and national publications, including the New York Times, The Washington Post, The Huffington Post, the Houston Chronicle, and the Kansas City Star. (T. 34 – 38; 272). He has been interviewed in radio coverage and has appeared in television coverage. (T. 34; G.C. 4, 5, 6; 272). A Google search of "Terrance Wise" and "Burger King" yields results showing extensive media coverage of coverage of Wise and his activities on behalf of the Union and the efforts to improve fast food wages and working conditions. (T. 40-41).

Store Manager Reda Hayes knew of Wise's union and protected concerted activity. (T 43). Hayes knew Wise had a stack of flyers for a July 2013 rally for Stand Up KC Workers Fight for 15. (T 43-44). Hayes knew that ever since the Workers Organizing Committee—Kansas City movement started, Wise was involved. (T. 371). She knows that he has been extensively quoted in the media, in newspapers and on television about the movement. (T. 371). Hayes involved Wise in her discussion of store issues with other employees who supported the Union. (T. 44-45). This was uncontroverted. The early March 2015 health and safety petition was given by employees Wise, Susie De La Cruz Camillo, Kashanna Coney, West Humbert, and others to Reda Hayes. (45-47)

Reda Hayes also knew of Wise' activity filing and supporting charges with the NLRB. Wise was a charging party in charge against the prior owner of this Burger King location, 14-CA-110164 (G. C. ex 9; T. 48-51), filed July 30, 2013, which included allegations that employees were intimidated and disciplined for engaging in concerted union strike activity, altering Wise's work schedule to make his working conditions more difficult. Store Manager Reda Hayes and Area Manager Grant were supervisors and managers involved in these actions. (T 51-52). This charge was the subject of a settlement and of a notice posted at the store. (T. 52). The notice covered the charge filed by Wise and two others: 14-CA-110261 and 14-CA-110264. (T 55-56). Wise was a named discriminatee in charge 14-CA-128388 filed in May 9, 2014, (T 56; G.C. ex 12) and in the amended charge in that case. As a result of those charges, a notice to employees was posted pursuant to a settlement agreement in English and Spanish at the 47th and Troost store. (T. 57-58; G.C. ex 14). Hayes was a witness in a 2014 charge filed over warnings given to Wise. (T. 367). Hayes knew that at least two warnings were removed from Wise' file as part of the resolution of the unfair labor practice charge. (T. 368). In about December, 2014, there was a notice reading at the 47th and Troost store where a Notice to employees was read. (T 59-60; G.C. ex 18). Hayes and other managers were aware of Wise' involvement in these 2013 and 2014 charges that challenged their actions and that resulted in settlements and the posting and reading of notices to employees at the store.

By March, 2015, Reda Hayes and other managers of the predecessor were well aware of Wise's protected union activity, his protected concerted activity, and his NLRB charge filing and charge support activity.

d. Respondent refused to hire Wise because of his union, protected concerted, and NLRB activities

By the time Respondent acquired the store, Wise was a long time employee at the Burger King at 47th and Troost. He was also a valued employee. In December, 2014, Reda Hayes presented him with a certificate for excellent work. (T 60). Wise and two other employees were recognized for work excellence for the year 2014. (T. 60) Reda Hayes praised Wise for his hard work and for being a very good employee. (T. 60). Hayes also told Wise how much she appreciated his work. (T 60-61).

On about March 26, 2015, Respondent took over ownership and operations of the Burger King restaurants at 1102 E 47th Street (47th and Troost) and on Main Street. On about March 25, Hayes gave employees applications for work with Respondent. Wise got his from her on March 25, filled it out, and gave it back to her that day. (T. 63; 65; G.C. ex 42). The store closed early on March 25 in preparation for the turn over. (T. 62). Wise left the store a little before 5:00 p.m. (T. 66).

For other employees, the application process was a mere formality: they were told they could take the application home and bring it back, and they did so, most turning it in several days after they started work for Respondent. (T.64; 191-192) Osmara Ortiz turned hers in on about March 31. (T. 191). Other employees were given an entire packet, including tax forms and a handbook with the application. (T. 152; 153-157; 190). Wise was given only the application itself, not an entire packet. (T. 63). The others were hired. (T. 76: 162; 192-193; G. C. ex 34;). Respondent refused to hire Wise.

Wise reported early for his shift the day Respondent took over in case he was needed. (T. 66-67). Shortly before his shift was to begin, Reda Hayes came out, sat down, and told Wise that she had bad news, that she received an email saying that she has to let him and three other people go. (T. 67). Wise asked, is it immediate, and Hayes said it was. (T. 67-68). Hayes said that she hated to do this, that she knew he had a family to support, and she hated losing one of her best workers. (T. 68). Wise told Hayes that he knew that she was just doing what she was instructed to do. (T. 68). Hayes said that she and other managers had complained that they have problems too and maybe they should go to the NLRB, and Wise agreed. (t 68-69.) Hayes said that they did not give her a reason that Wise should not be kept. Hayes said that she did not have a problem with Wise except sometimes he would leave his name tag home or he would have a lot of food cooked up, but that she always knew he would take care of the customers. (T. 69). Hayes mentioned that she had problems with the appearance at work of a couple of the other employees, but not with Wise. (T. 69-70). They talked about which area Burger Kings were operated by Respondent and about Wise applying for work at a Burger King that is not owned and operated by Respondent. Hayes stated that she would not blackball him, that she would give him a good reference wherever he went. (T 70-72). Hayes caught sight of other employees in the kitchen watching them at a distance, and said that if the other

employees asked what happened, she would just tell them that Wise got sick and had to leave, or had something come up that day, that she would not tell them about this conversation. (T. 73). At the end of the conversation, Hayes told Wise that she never really had a problem with him, that he had been one of her best employees and wished him good luck. They shook hands, and Wise left. (T. 72). Wise states that he left without his final check, but that Hayes called that evening and said that he could pick up his final check. (T. 74).

Wise' account of this conversation with Hayes was detailed and was in his own words. He was clearly recounting what he recalled. His account of this conversation was the type of account he was able to give of this as well as other events he was questioned about as well. His testimony showed that he was describing what he recalled, events that he lived through, the people and places and what happened to him at work in 2015 and 2014. This care with people and places and what was said and times and locations are hallmarks of reliable recollection.

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire in order to discourage union activity. The Board applies *Wright Line* analysis: the General Counsel must show that the employee engaged in union activity, the employer had knowledge of that activity, and the employer harbored animus towards that activity. *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1st Cir 1981), cert den 455 U.S. 989 (1982). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbulding*, 330 NLRB 464, 464 (2000). Once this initial showing is made, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of the employee's protected union activity. *Id.*

To establish a discriminatory refusal to hire, the General Counsel must ... first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

FES, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd 301 F.3d 83 (3rd Cir. 2002).

The *Wright Line* initial factors were proven: Respondent was hiring, Wise was qualified, Respondent refused to hire Wise because of his union activity, his protected concerted strike activity, and his activity filing and supporting NLRB charges.

e. Respondent failed to show it would have refused to hire Wise regardless of his protected activity: the pretextual reasons now asserted by Respondent

When an employer's proffered reasons for an action are pretextual (either false or not actually relied on), the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp*., 340 NLRB 382, 385 (2003).

Respondent was served a subpoena duces tecum which called for the production of "documents that show the reasons Terrence Wise was not hired or was discharged about March 26, 2015 and the reasons that other employees were hired for Respondent's facility at 1102 E. 47th Street, Kansas City, Missouri about March 26, 2015." Respondent had NO documents responsive to that request. (T. 285). Respondent had no records to buttress any of the reasons its witness testified to at hearing. The only witness who testified as to why Wise was not hired was LaReda (Reda) Hayes.

Hayes' testimony regarding the no-hire conversation with Wise was short and lacking in detail. Hayes stated that she told Wise only that due to his change of availability and some insubordination "and whatever" going on, she decided not to bring him on with Respondent. (T. 346-347). Hayes said that anybody was fair game not to come on. (T. 346-347). Hayes stated that Wise replied, okay, well, I'm out, and Hayes said well, have a good day. (T. 347). According to Hayes, that was the entire conversation: that was all she told an experienced, very competent employee when informing him of the end of his long employment at that restaurant and under her direction.

Wise was a long time employee, who had, at the end of 2014, received from her an award for excellent work in 2014. This is not denied. Hayes stated that in early 2015, she used Wise whenever she needed him, and this was helpful for the business. Hayes admits that some employees were available only for certain shifts, but Wise made often made himself available

for other shifts as well. (T.373). Respondent attempted no showing that in his application, Wise limited his availability any more than others who were hired: it looks like he was more available than many other employees. Hayes admits that the ability to work different positions, as Wise could and did, was a valued trait. (T. 30; 393). The March 26 conversation as recounted by Hayes does not ring true—this would not be all of the conversation announcing a refusal to hire that ended a long time employment relationship. Wise approaches things more methodically and more confidently than that. Wise would not have had such a short conversation, especially about such an important event.

When asked by Respondent's counsel why she did not hire Wise, Hayes said it was because of his insubordination, his tardies, his no shows, and him feeling like he can run the restaurant without management supervision. (T. 348-349). She forgot to include the sandwich take out incident until she was asked a leading question by Respondent's counsel. (T. 348-349). She did not mention availability. Furthermore, in Hayes' description of her March 26 conversation with Wise regarding not hiring him, she mentioned none of the factors to Wise that she mentioned in her testimony. According to both Hayes and Wise, she gave him NO reasons that he was not hired. That is probably because the reasons given by Hayes at hearing were not the real reasons for the refusal to hire at all, they were arguments crafted for defense at hearing.

In responding to the charge during the investigation, Respondent said only that it did not terminate Wise because he had never been hired: it gave none of the reasons advanced at hearing for refusing to hire him. (G. C. ex. 43). Respondent's position letter is relevant and should be admitted into evidence for this reason. Possibly relating to this issue, Respondent attaches a letter to its brief which it did not offer into evidence, which is improper (a request for evidence letter from Board Agent to Respondent). At hearing, when offering Respondent's position letter, G.C. ex 43, into evidence, General Counsel argued that it showed that Respondent was making its arguments for the first time at hearing. (T. 438-439).

Closer examination of the reasons given by Hayes for the Respondent's refusal to hire Wise shows those reasons to be pretextual and fatally flawed.

Hayes testified that Wise was not hired because in 2013, he was given three warnings for tardies. These warnings were the subject of an NLRB charges and were to have been

removed from his file and should not have been relied upon for any purposes. (T. 370-371. 415-417). Wise explained the circumstances of these warnings, explaining that when he knew he was going to be late, he called in. (T. 419-420). In one instance, Wise misunderstood when he was to be there. Hayes also admits that after these warnings in early 2014, Wise got no further warnings for tardies. (T. 370-371).

Hayes admits that some employees have had multiple write ups for tardies and for not showing up, and they are still employed. (T. 396). She admits that some employees have had multiple write ups for being tardy. (T. 397). She says that whatever supervisor does the write up puts it in the employee's personnel file and she does not keep track of all the attendance write ups. (T. 397). It appears that Wise has been treated disparately in this regard. Others have had multiple write ups for tardies and for not showing up, and it has not affected their employment. Also, the fact that Hayes does not keep track of all the attendance write ups shows that generally, this does not matter. It would not have mattered for Wise without his union, protected concerted activity and charge filing activity.

Respondent argues that only its predecessor was constrained from relying upon the expunged warnings, but that Respondent did not enter into the settlement so it can rely upon them. In support of this argument, Respondent argues that an employer who is not a party to an agreement cannot be held liable to implement the remedy. This is not an instance where Respondent is being held liable for the actions of its predecessor, either backpay or reinstatement. Here, Respondent should be held responsible for its own actions: refusal to hire Wise. Here, the problem is that Hayes, who said she was making the no-hire decision for Respondent, knew that warnings were to be expunged and were not to be relied upon in future personnel action, yet she testified she relied upon those very warnings in deciding not to hire Wise. Respondent cites no authority supporting its reliance upon such warnings. Hayes knew that an unfair labor practice charge alleged that these warnings were given because of union and protected concerted activity: she was a witness in that case. She knew that as a part of the settlement, the warnings were to be removed from Wise' file and not relied upon for future personnel action. The parties should not now litigate issues that were settled. Respondent cannot knowingly rely upon expunged warnings in its refusal to hire Wise. This is part of the case where Respondent bears the burden of proof to show that it refused to hire Wise for

reasons other than his protected union, protected concerted, and protected Board charge filing activity. It has not shouldered that burden here.

When pressed for specifics on the reasons that Wise was not hired, Hayes said that another factor was that on occasion, he cooked too much product. She could give no specific examples and no dates. (T. 379-380). She said it happened throughout the time he worked under her direction. (T. 380). Hayes said that she counseled him about it twice, and gave him a warning on it once, but could give no dates. (T. 381). She did not discharge him (she says this was while she could discipline him without checking with Human Resources.) (T. 381). This was not enough of a problem that it interfered with Hayes giving Wise the award for work excellence for his work for the year in December 2014, so it is incredible that it could have been a reason not to hire Wise in March, 2015. The testimony of Wise that in late 2014 and early 2015, Hayes told him that she appreciated his good work also stands uncontroverted.

Hayes testified that another factor in her decision was that Wise had given food to homeless people who occasionally seek shelter in the restaurant. This was food that was left too long before serving that had to be thrown away. Hayes' complaint in this regard is that giving this food away interferes with inventory control procedures when Wise did this without first seeking permission. (T. 382). Hayes stated that she counseled Wise on this but did not give him written discipline, she just instructed to get permission from a manager first. (T. 383). Hayes did not recall exactly when this was a problem—she thought it was in 2014 but it was not in 2015. (T. 383). Clearly, if she did not recall when it happened, if it happened long before the refusal to hire, and if this did not merit even a written warning, this was not a factor in refusing to hire Wise.

Hayes also stated that it was a problem that Wise sent another crew member on break without a manager's permission. (T. 384). She did not know who he sent on break, and did not recall when it happened, she did not know what year it was. (T. 385). Hayes stated that she counseled Wise for this but gave him no further discipline. (T. 385). Once again, it is incredible that something that did not even require written discipline, something that she could not even pin down to a year, was important enough to be a factor in refusing to hire Wise. Once again, the 2014 and 2015 complements and the 2014 year end award were given to Wise regardless of this factor.

Wise testified that he was not cavalier with the rules, that he was respectful and tried to be on time and in uniform, and that he was never rude. (T. 421-422).

Hayes also testified that, in the winter (year not specified), Wise was caught by manager Yon Nonnua (Nia) Cline with 6 or 7 sandwiches in his pocket leaving the restaurant. (T. 344; 373). Wise was given no discipline at all for this incident. (T. 373) On direct examination, Hayes gave no date for this incident. During cross examination, and in questioning from the Judge, Hayes said it was in February, 2014. (T. 375). Hayes then said it was close to the end of the year in 2014. (T. 376). It was only on redirect, after suggestive questioning by Respondent's counsel, Hayes changed her testimony a third or fourth time and said it must have been February 2015. She had already twice said it was in 2014. Hayes testified that this only happened once, and did not happen any other time. (T. 386).

Hayes explains the lack of discipline to Wise by saying that at some point, she was instructed that all recommendations for discipline had to go to Human Resources, and that after she recommended discipline, and heard nothing back, she did not bother recommending further discipline. Yon Nonnua Cline (called Nia Cline by witnesses) also stated that they were not allowed to write up any employee who was active with the Workers Organizing Committee. Nothing in writing was produced to back up testimony on this unusual arrangement. Copies of none of Hayes' recommendations were produced. There apparently was no paper trail at all. Nor could the witnesses say when these unusual directives were given. Hayes did not explain why, after these incidents, she then gave Wise an award in December, 2014 for excellent work in 2014. That she gave him the award is uncontroverted. Hayes did not deny telling Wise on multiple occasions that he was doing good work. This unusual testimony of Hayes and Cline, which was not supported by any documentation which Hayes testified existed (her recommendations to Human Resources), is a flimsy foundation upon which to build a defense, especially in light of the fact that Hayes' testimony itself lacks the specifics and details which demonstrate memory of events in question.

Like Hayes, Cline also placed the sandwich take-out incident in 2014 (T. 318), until Counsel asked whether it was 2014 or 2015. (T. 318) Cline testified that there was no discipline to Hayes for this incident because of email instructions (T. 321) regarding Wise and the other employees on the strike committee. Cline stated that this list of employees who

could not be written up included about 40 of their 45 people. (T. 323). These purported email instructions were not offered into evidence.

On cross examination, Wise was asked whether Cline caught him taking food out of the restaurant, and Wise did not know what Attorney Ross was asking about. Ross asked whether there was one night or one time when he was getting off and he was confronted about having things in his coat pockets. Wise replied that this was food he had permission to take. (T. 118). Wise did not recall Cline patting him down and pulling "about eight burgers out of your pockets". (T 118-119). In further questioning, Wise explained that Sundays were slower and there was a skeletal crew, and there was no one to cover his position when he went on break, so he worked through and at the end of his shift, the manager on duty allowed him to take home something to eat. (T 424-425). So Wise did take home food at the end of his shift on Sunday with permission of the shift manager that worked the shift with him. (T. 425). Sharroll was the shift manager who most often worked with him on Sundays, and he asked permission to take a burger or two home and Sherroll gave him permission. (t. 425). Wise denied that there was an incident where he had four or five burgers in his coat pocket and Cline found them. Wise denied ever taking four, six, or eight burgers. Wise said that on Sundays, Sharroll left and Cline arrived, and that he would have asked permission to take something home from Sharroll, and that Sharroll would leave, and then he would leave at about the time Cline arrived. (T. 425-426). Wise said that there was a time when he was leaving as Cline was coming, and she said, let' see your pocket. He laughed and replied, are you going to pat me down, and she said turn around, and took two burgers out of his pocket, and said, what are these? Wise replied that Sharroll had given him permission to take the two cheeseburgers. Cline said, she has already left, and took the burgers from him. (T. 426-427). Wise then left the restaurant and heard nothing more about it. Hayes did not mention it and he received no discipline. (T. 426-427). Wise explained that employees were allowed to take food home after getting permission from a manager, that this was the practice for both employees and supervisors. (T. 428). There was no payment involved and it was accepted when done with permission of a manager. (T. 428).

Osmara Ortiz confirmed that almost everyone in the store eats during their shift or takes food home at the end of their shift with permission from a supervisor. (T. 435-436). This

is done without the employee paying for the food and with the permission of a supervisor. (T. 437). Ortiz stated that she has done this, and other employees have done this, and that Reda Hayes has done this. (T. 436-437). Ortiz has not seen another employee accused of theft or told that they were doing anything improper. (T. 437). The testimony of current employees, particularly those which contradict statements of their supervisors, is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996).

There was no denial that the practice was for employees to eat food during shifts or take it home after their shift, without paying for it, with permission of a supervisor or manager. According to Hayes, after this incident, Wise was given no discipline at all. Both Hayes and Cline first placed the incident in 2014. Cline stated that there were email instructions that the vast majority—she said 40 of 45 employees—could not be written up by store management without consulting with Human Resources. Cline testified that the email listed the employees who could not be written up. This email was not made part of the record. Once again, a reason has been advanced for refusing to hire Wise for which there was no documentation. Wise was given no discipline whatsoever for this incident. Respondent has failed to shoulder its burden to show that this incident was a reason for its refusal to hire Wise.

Respondent states that Wise was treated like three other employees who were not re-hired. None of these three were comparable to Wise: none were long-time nearly full time employees. (T. 409-410). None of these three applied and all three left before Respondent came in. (T. 376; 377-378) Respondent did not refuse to hire any of the three. (T. 378). In contrast, Hayes did not tell Wise that he need not apply for work with Respondent. (T. 408).

Respondent argues that it hired employees such as the six who were given written warnings for striking on April 15, even though Hayes knew of their union activity. (T. 331-338). Wise's union activity and protected concerted activity was of a much higher magnitude and was much more prominent than that of the other employees. Wise was a leader in his work place, in the city, and beyond. (T. 177; 270-273). Wise began the organizing effort at the Burger King at 47th and Troost. He was the first worker there to support the Union. (T. 272). He has been at that store for many years so he has strong relationships with the people in that shop. He began to sign up his coworkers to get them involved. Other employees have gotten involved in

that shop, but he has been the anchor in the shop. (T. 272). He has been the worker who has signed up the most workers in his store. (T. 273). That has been a defining feature of his leadership: his ability to move his coworkers to take action. They trust him. He is bringing his coworkers together to take action to win $15 and a union. (T. 273). The Board has long recognized the strong and adverse impact of action directed against the employees who lead union and protected concerted activity. The refusal to hire Wise sent a strong message to other union supporters. Wise was also uniquely identified as a filer and supporter of charges with the NLRB. As noted above, Hayes knew of these activities. Also, the argument that Respondent did not discriminate by refusing to hire others who engaged in union activity does not prove that it did not discriminate against Wise by refusing to hire him.

f. Credibility resolutions

The accounts of Hayes and Wise differ regarding their March 26 conversation in which Hayes informed Wise that he would not be hired by Respondent. They agree that they had such a conversation, about when and where it took place. They agree that Hayes told Wise that Respondent would not hire him. They disagree on the rest of the conversation. They also disagree regarding whether Hayes ever mentioned the sandwich take-out incident to Wise. Wise says that she did not. She says that she did, but admitted that she gave him no discipline and took no further action. She says she did not even make a recommendation to Human Resources (although that no-discipline-to-the list-of-40 may have been created for this trial). Hayes testimony regarding the reasons for the decision not to hire Wise also is suspect for the reasons discussed above.

Respondent refused to hire Wise. It makes no difference whether Hayes made the decision herself and told Wise that she was just doing as instructed, or whether she finally got to do what she wanted to all along— get rid of a gadfly, someone whose union activity and charge filing activity made her job occasionally more difficult. On March 26, as noted above, Hayes told Wise that the decision not to hire him was not her decision, that she was just following instructions, that she received an email that morning instructing her that Respondent would not hire him. It makes no difference whether what she said was true or she just said so to make the conversation easier at that moment.

Supervisor Cline testified to the sandwich take-out incident, and to the no-discipline-to-the-list-of -40 system. As described above, Cline's unprompted testimony was that the sandwich incident took place in 2014, as did the unprompted testimony of Hayes. Cline also testified that there was no discipline to Wise afterwards. She explained this by saying that store management was instructed that it could not discipline Wise because he was on a list of 40 employees listed in an email who had been involved in strike organizing activity, and discipline to these employees had to be approved by Human Resources. The email was not produced. No written support was produced. Cline was not able to describe when this email came. The description she gave is not believable. It is general and lacks specifics. It was not put in context. Osmara Ortiz, a current employee, candidly and credibly testified that the practice was that employees often sought management approval and were allowed to take food home after their shifts. Ortiz knew of no one disciplined for doing so. This testimony was unchallenged.

Where the testimony of Wise and Ortiz and that of Cline conflict, Wise and Ortiz should be credited.

Where the testimony of Wise and Hayes conflict, Wise should be credited.

Factors to consider when resolving credibility issues include context, demeanor, the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Double D Construction Group, 339 NLRB 303, 305 (2003); *Northridge Knitting Mills*, 233 NLRB 230 (1976); *Bronx Metal Polishing Co*., 276 NLRB 299 fn 35 (1985).

Consider the credibility factors:

1. Context: Respondent refused to hire Wise, a seasoned, knowledgeable, long-time, low-wage employee. Of all the employees at the store who wanted to stay working at the store and applied for work with Respondent, only Wise was not re-hired. Of all the employees at the Store, Wise was by far the leader of the union activity and was central in the charge filing activity.
2. Established or Admitted Facts: It is uncontroverted that Wise was given an award in December, 2014 for outstanding performance in 2014. It is uncontroverted that Hayes told Wise on more than one occasion in late 2014 and early 2015 that she

appreciated his good work. Respondent showed no discipline to Wise at all other than the three warnings that were to be expunged, which were given over 10 months before its decision not to hire him. The three expunged warnings were dated 4/21/2014, 5/5/2014 and 5/6/2014. (See Respondent ex.s 4, 5 and 6). With permission and without paying, employees were allowed to eat at the store on break or to take food home with them. A number of employees had multiple discipline for tardies or no-call no-show and were hired and are still employed.

3. Demeanor: Both parties, General Counsel and Respondent, would both argue that the demeanor of their witnesses was most convincing, but part of demeanor is how witnesses answered questions, and whether their answers were their own or the product of leading questions. General Counsel submits that the questions to Wise were open, and that Wise's answers were detailed and in his own words. Clearly, his account was his own and not something General Counsel fed him. The testimony of Ortiz was careful and candid. In contrast, the questioning of Hayes and Cline was often by leading questions, and their answers were often brief and lacking in description and detail. Note that there was very little cross examination regarding statements made by Wise in his affidavits, and Wise had many long affidavits that were produced before cross examination. Note also, that no contradictions were found between what Wise said in his affidavits and his testimony at hearing: had there been, Respondent's attorneys would most certainly have used it in cross examination. It is submitted that no contradictions were found because Wise was telling the truth both in his affidavits and at hearing. When a witness is telling the truth, it is easier to be consistent. Wise gave thoughtful, detailed answers and was a generally cooperative witness. In contrast, the testimony of Hayes was on some important occasions couched in terms of "I would have" or "he would": she was clearly not describing her recollection of a particular occasion. She also seldom described a specific incident that happened in a certain period of time or near a definite event, but rather couched her testimony in general terms.
4. Weight of the Evidence: It is submitted that the clear weight of the testimonial and documentary evidence, as set forth in this brief, supports the testimony of Wise.

5. Inherent Probabilities: The position for which Respondent refused to hire Wise is one he held successfully and performed in outstanding fashion for years. His record was as good or better than many of the employees of Respondent. Respondent relies upon a work force of many employees, many of them part time, all of them low skilled and low wage. Respondent has high turnover. It is incredible that Respondent relied on such remote, minor, undocumented incidents in its decision not to hire a long time valued employee. It is not probable that the sandwich-take-out incident happened as Hayes described: she did not even bother to or attempt to discipline Wise for it. The lack of discipline makes sense if the event happened as Wise described but makes no sense if it happened as Hayes described. If it were an important event, and even if store management was instructed in an email that discipline had to be routed through human resources, surely Hayes would have recommended that Wise be disciplined and would have heard something back from human resources. In either case, Respondent would have offered such records into evidence. They did not do so and offered no testimony to explain why they did not.
6. Reasonable inferences that should be drawn from this record as a whole: Wise was a long term valuable employee. His union and charge filing activity was well known to Respondent. Respondent cited no discipline to Wise within 10 months of its refusal to hire him. Respondent hired all of the other nearly full time employees at the 47th and Troost store. It was only Wise who was not hired. The reasonable inference is that Respondent refused to hire Wise because of his protected union and protected concerted activity and his activity bringing and supporting Board charges. The testimony of Hayes and Cline was not internally consistent, and was not consistent with the weight of the credible evidence. Where they conflict, the testimony of the witnesses of General Counsel should be credited.

5. Remedies Sought

a. Order should include notice reading and all just and proper relief

General Counsel seeks an order requiring that the Notice to Employees be read at both facilities during working time in both English and Spanish by Respondent. The order should

include remedies including the posting of an appropriate Notice to Employees, and a full make-whole backpay remedy for Wise and a offer to hire him at the rate he would have made at the time of the offer had he been hired about March 26, 2015. Any other just and proper relief for the unfair labor practices outlined above should be ordered as well.

b. Order should include full reimbursement of search-for-work and work-related expenses

The Board should award search for work and work related expenses in back pay regardless of whether these amounts exceed interim earnings. Respondent is on clear notice that this remedy is being sought and that it is to be briefed. (T. 19). Respondent was invited to brief the issue. (T. 19). Respondent can and should address this issue should it file a reply brief.

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.,* 112 NLRB 371, 374 (1955); *Crossett Lumber Co.,* NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment [1]; the cost of tools or uniforms required by an interim employer[2]; room and board when seeking employment and/or working away from home [3]; contractually required union dues and/or initiation fees, if not previously required while working for respondent [4]; and/or the cost of moving if required to assume interim employment[5].

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities* Co. 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the

[1] D.L. Baker, Inc., 35` NLRB 515, 537 (2007).
[2] *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees,* 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.,* 151 NLRB 1113, 1114 (1965).
[3] *Aircraft & Helicopter Leasing,* 227 NLRB 644, 650 (1976).
[4] *Rainbow Coaches,* 280 NLRB 166, 190 (1986).
[5] *Coronet Foods, Inc.,* 322 NLRB 837 (1997).

discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also N Slope Mech.,* 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work[6], but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.,* 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj,* 361 NLRB No. 57 at *2 (Sept. 30, 2014) (quoting *Phelps Dodge).* The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991,

[6] *In Re Midwestern Pers. Servs., Inc.,* 346 NLRB 624. 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

Decision No. 915.002, at *5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.,* 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dept of Labor,* No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." *Don Chavas, LLC,* 361 NLRB No. 10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period. [7] These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.,* 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

6. Conclusion

For the reasons set forth above, it should be found that

- Respondent violated Section 8(a)(1) when Sharts told Jones that Respondent had instructed Sharts to write up employees who participated in the April 15, 2015 strike;
- Respondent violated Section 8(a)(1) and (3) when Respondent gave written warnings to Suzana De La Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myesha Vaughn because they engaged in protected concerted activities for the purposes of mutual aid and protection by acts including striking and getting together with other employees to try to improve wages, hours, and working conditions; and
- Respondent violated Section 8(a)(1)(3) and (4) when Respondent refused to consider for hire or refused to hire Terrence Wise because of his protected concerted activity,

[7] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.,* 104 NLRB 514, 516 at *2(1953).

his protected union activity, and because he brought and supported unfair labor practice charges before the NLRB.

The Respondent should be ordered to fully remedy these unfair labor practices.

Respectfully submitted,

September 24, 2015

Lyn R. Buckley

Lyn R. Buckley
Counsel for General Counsel
National Labor Relations Board, Subregion 14
Overland Park, KS 66212-4677
lyn.buckley@nlrb.gov

STATEMENT OF SERVICE

I hereby certify that a copy of the foregoing Counsel for General Counsel's Brief to the Administrative Law Judge has been e-filed with the Division of Judges and that a copy has been served by certified and regular mail and email as noted.

John L. Ross Jason T. Weber Thompson, Coe, Cousins & Irons, LLP 700 North Pearl Street, Suite 2500 Dallas, TX 75201	certified mail and email
Fred Wickham Brian Noland Wickham & Wood, LLC 4317 S River Blvd Independence, MO 64055	certified mail and email
Workers' Organizing Committee--Kansas City P.O. Box 5946 Kansas City, MO 64171	regular mail

Dated: September 24, 2015

Lyn R. Buckley

Lyn R. Buckley
Counsel for General Counsel
National Labor Relations Board, Subregion 14
Overland Park, KS 66212-4677
lyn.buckley@nlrb.gov